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The Federal Courts of Appeals are afflicted with an illness. While it is not malignant, there is a potential prognosis of chronic incapacity or partial paralysis. The possible treatment, depending upon the physician, may be either radical or conservative. The thrust of this paper is to offer a basis for a differential diagnosis.

The symptoms of the illness are familiar to all who are interested in judicial administration. The number of new appeals filed has increased each year at an alarming rate. Each year the number of appeals terminated has been less than the new matters filed. The number of appeals pending has increased to the point that as of June 30, 1971, it stood at 9,232. Thus, at the 1971 rate of terminations, the circuit courts would have to work nine months just to eliminate the backlog from the preceding year.[1] The following table graphically summarizes the situation over the past decade.[2]

Alarming as these statistics may be, the prognosis is even more guarded. According to a forecast made by the Federal Judicial Center, the number of new case filings at the district court level will reach 350,000 cases by 1990 if the trend of filings for the 1968-1970 period continues. The Center estimates that 1,129 district judges would be required to handle such a caseload.[3] Postulating the same ratio of circuit judges to district judges as now exists, about 250 circuit judges would be needed by 1990.

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[1] It should be noted, however, that a case is not ready for submission when the appeal is filed. But preparation of the record, briefs and calendar administration require only 124 days under the Federal Rules of Appellate Procedure.

[2] This table appears on page 808 and was taken from the Director of the Administrative Office of the United States Courts Annual Report (1971), Table 2, at 99.

[3] Federal Judicial Center, Third Mid-Year Report 16 (March, 1971).

TABLE No. 1

APPEALS FILED, TERMINATED, AND PENDING IN THE UNITED STATES COURTS OF APPEALS FISCAL YEARS 1962 THROUGH 1971

Fiscal Year	Number of judgeships as of June 30	Appeals Filed	Appeals Terminated	Appeals Pending June 30	Increase in appeals pending
1962	78	4,823	4,167	3,031	656
1963	78	5,437	5,011	3,457	426
1964	78	6,023	5,700	3,780	323
1965	78	6,766	5,771	4,775	995
1966	88	7,183	6,571	5,387	612
1967	88	7,903	7,527	5,763	376
1968	97	9,116	8,264	6,615	852
1969	97	10,248	9,014	7,849	1,234
1970	97	11,662	10,699	8,812	963
1971	97	12,788	12,368	9,232	420
Percent change 1971 over 1962	24.4	165.1	196.8	204.6	
1971 over 1970	0.0	9.7	15.6	4.8	

Thus, one can pose the problem: How to restructure an intermediate federal court system so that it can accommodate, efficiently and fairly, an increase in manpower from 97 to 250 judges by 1990? Before a solution can be found to this critical problem, a number of subsidiary propositions must be explored.

A. *What is the Maximum Number of Judges for a Court of Appeals?*

There are some who say that nine is the maximum number of judges which can be efficiently and fairly seated on such a court. This is a position which was taken by a Special Committee on the Geographical Organization of the Courts back in 1964. In a report to the Judicial Conference of the United States, the Committee stated:

> . . . that in its judgment nine is the maximum number of active judgeship positions which can be allotted to a court of appeals without impairing the efficiency of its operation and its unity as a judicial institution.[4]

The Judicial Conference itself took no position on this aspect of the report of its special committee. Moreover, at least one eminent student of the problem has criticized the notion that the maximum number of judges should be nine.[5] Nevertheless, the Second Circuit Court of Appeals seems to be adhering to the "rule of nine" even at this late date.[6]

The fact of the matter is that both the Fifth and Ninth Circuits operate quite well with 15 and 13 judges, respectively. The Second, Third, and Sixth Circuits now have nine judges each and the Judicial Conference has recommended two additional judges for the Second and one more for the Third.

Nor should it be supposed that 15 judges is a maximum permissible number. The Second Circuit with nine active judges also has extensively used the services of 5 senior judges.[7] The Fifth Circuit, through the use of visiting judges, operated with the equivalent of 7 additional, or 19 total, judges in fiscal year 1969.[8]

If we must adhere to an arbitrary limitation of nine, it would require 27 circuits to employ the 250 judges needed by 1990 assuming that we retain the present structure of the appellate system. Even a twleve-judge limit would require over 20 circuits. One can well imagine the amount of intercircuit disparity of opinion which such a proliferation of circuits would induce.

The advocates of such an arbitrary limit to the number of judges rely upon the argument that a court of appeals must retain its "collegial" nature in the interest of efficiency, harmony

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[4] THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS 15 (March, 1964).

[5] *See* C. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964). In his analysis of the problem, Professor Wright stated: "This is by no means to say that the larger the Court the better. Clearly the fact is otherwise. But the problem is one of choosing among alternatives." *Id.* at 973.

[6] *See Hearings on H.R. 7378 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 17, at 148 (1971) (letter of Judge Henry J. Friendly).

[7] *Id.* at 23 (testimony of Judge J. Edward Lumbard).

[8] *Id.* at 93, Table 5.

and quality. While these are vital characteristics of an appellate court, it is submitted that an increase in judges beyond a supposed maximum will neither destroy nor seriously impair effective work by the court. In 1971, only 51 *en banc* hearings were held in all Courts of Appeals, with 25 of them being held in the Third and Fifth Circuits. At the present time, therefore, the collegial aspect of these courts is maintained by devices other than sitting *en banc*. Cases are heard and a tentative opinion arrived at by only three judge divisions. Opinions are frequently drafted at chambers located some distance from the place of hearing. Draft opinions are circulated, usually by mail, among the three judges. Some circuits also have a procedure for a wider circulation in difficult or important cases. So it would seem that at the present time the collegial nature of the court is preserved through rotating assignment to divisions, by meetings, formal or informal, at the place of hearing, and by periodic assembly of the entire court at Judicial Council meetings and other special occasions. On balance, it would seem that such a system for interchange of views would still be possible were the number of judges to exceed 15, or even 20. Even though some dilution of *esprit* would result from too large a number, it might be preferable to risking the creation of parochial courts if, for example, a circuit were to comprise only one state, or a part of a state.

B. *Does Geographical Realignment Solve the Problem?*

Circuit splitting is frequently mentioned as a solution to the heavy workload in a particular circuit. Historically, only one new circuit has been created since the Court of Appeals system was created in 1891. In 1929, the Eighth Circuit was realigned into the Eighth and Tenth Circuits. In the 88th Congress, a bill was introduced to split the Ninth Circuit, but the Judicial Conference disapproved the proposal "at the present time,"[9] and the bill was not advanced legislatively. In 1964, the Special Committee on the Geographic Organization of the Courts recommended a split of the Fifth Circuit with the Mississippi River as the dividing line. Although this proposal reportedly was desired by the judges of that circuit, a storm of criticism arose. No bill was introduced.

[9] THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 4, at 14.

While both of those circuits involve a large number of states, the Second Circuit has yet another problem. The volume of appellate business generated in the District Court of the Southern District of New York is alone sufficient to justify, on a statistical basis only, a separate circuit court of seven or more judges. Jokes are made that a realignment of the Second Circuit could be made by drawing a line across Manhattan at 42nd Street. But the joke is almost a fact. In 1971, the Southern District of New York generated 722 appeals, which is almost twice the total for the First Circuit and more than either the Eighth or Tenth Circuits.

The Administrative Office of the United States Courts has estimated the 1975 needs of the ten circuits as shown in the following table. Thus, a split of the Fifth Circuit requirement of

TABLE NO. 2[10]

Circuit	CIRCUIT COURT JUDGESHIPS Present Number	1975 Needs
1st	3	3
2nd	9	14
3rd	9	14
4th	7	9
5th	15	23
6th	9	10
7th	8	11
8th	8	10
9th	13	20
10th	7	9

23 judges would create, theoretically, a twelve-judge circuit and an eleven-judge circuit. The Ninth would yield two ten-judge circuits. But the 1975 needs of a total of 123 judges are only about one-half the needs arising from the Federal Judicial Center projections for 1990. It seems clear that were we to split circuits in the 1970's, we would have to realign them again in the 1980's and 1990's. While such a process may be acceptable for legislative districts, it seems intolerable for a judicial system. If we adopt a policy of circuit splitting, the year 2021 may find a federal trial and appellate

[10] *See* "Judgeships Needs in U.S. Courts of Appeals," a statistical study, Administrative Office of the U.S. Courts, February, 1971.

system coextensive with state boundaries. This is a result which should be avoided.[11]

It is submitted that geographical realignment of the several circuits is but a short range expedient, to be avoided unless it is part of a long range solution.

C. *Should Circuit Boundaries be Eliminated?*

An alternative solution to the problems of the Courts of Appeals which has been suggested involves the elimination of boundaries between the circuits.[12] Apparently the suggestion would involve a concept wherein there would be a single United States Court of Appeals. All circuits would be abolished, and through a central assignment office, calendars would be composed both for judge sittings and appeal hearings. Cases would still be heard by a panel of three judges. *En banc* review would be accomplished either by *en banc* panels selected among the appellate judges or by a "super-circuit" or "court of review."

We know of no literature where this concept is fleshed out beyond the skeleton outline set forth in the preceding paragraph. However, the bare concept immediately raises a host of inquiries.

The administrative difficulties would seem to be considerable. How will the central assignment office be constituted? Will that office operate without judge control of and responsibility for its operation? Will there be a need for some decentralized administrative function or are all briefs and records to be filed in the central office? Will all appellate judges be rotated or assigned to the three judge hearing panels, or will such rotation occur only among those judges located within a decentralized region? What effect does one or the other plan of rotation have upon the travel time and travel expense involved? If we are to have 40 three-judge panels, how much disparity of opinion will result, and, more important, how will it be resolved? For example, if the judges on the 40 appellate panels were to entertain, and split evenly, on a single question of national law, would we permit 5, 7, or 9 of their number to review the question *en banc*? Or must

[11] See Professor Wright's suggestion that the major strength of the Courts of Appeals lies in the fact that they are broad regional courts. Wright, *supra* note 5, at 974-75.

[12] BUS. WEEK, Dec. 4, 1971, at 46.

the question be resolved by the Supreme Court of the United States which has a docket so crowded that it barely permits jurisdiction based on disparity of opinion between lower tribunals? If the Supreme Court or a new "court of review" cannot adequately remove such disparity, will we be inviting panel-shopping by adroit litigants?

Be these questions easy or difficult of resolution, there is, in our opinion, an even greater disadvantage to the elimination of circuit boundaries. The supervening obstacle arises from the fact that the Courts of Appeals, divided as they are into circuits, are, in fact, collegial courts. We have previously suggested that they are *not* collegial in the sense that the judges collectively hear a case, meet in conference for deliberation on the case, and join together in handing down a decision. Such is not the situation, except for the rare *en banc* case. On the other hand, these courts are collegial in the sense that the judges of these courts collectively must assume the responsibility for both the quantity and the quality of justice dispensed within each of the circuits. They collectively share the pride of accomplishment in coping with a heavy calendar or in deciding difficult cases, and they collectively must assume the responsibility if the end results of either effort are found wanting. One need only look at the efforts made by the judges of the Courts of Appeals of our most over-burdened circuits to realize that pride and responsibility are important elements of our judicial system. How then are those characteristics going to be implanted in a system of 40 rotating panels of judges?

D. *Can Structural Changes Accommodate More Judges Within the Appellate System?*

The burgeoning caseload of the Courts of Appeals has drawn the attention of many legal scholars in the past 10 years. In the mid-60's the American Bar Foundation commissioned a study of the problem through a special task force.[13] In 1968 this group issued a report[14] in which it recommended, *inter alia*, that certain

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[13] Professor Paul D. Carrington was the Project Director. Members of the Advisory Committee under the chairmanship of Bernard G. Segal, were Lindsey Cowen, Charles S. Desmond, Nathan B. Goodnow, Leon Jaworski, David W. Louisell, Thurgood Marshall, Carl McGowan and Paul J. Mishkin.

[14] AMERICAN BAR FOUNDATION, ACCOMODATING THE WORKLOAD OF THE U.S. COURTS OF APPEALS (1968).

structural changes were necessary in order to permit the use of an increased number of judges in the federal appellate system. Its discussion of the basic problem of how to accommodate an increased number of judges in the federal appellate system can be summarized as follows:

> 1. Once a circuit reaches nine judges, the desirability of adding more judges must be compared to the most direct alternative, that of splitting a circuit to create a new circuit. On balance, it is more desirable to add judges than it is to split circuits.
>
> 2. When the number of judges in a given circuit exceeds 15, a "division" system should be adopted whereby judges would be assigned on a rotating basis to 5 or 7 judge-divisions, with each division having responsibility for specific substantive subject matter. Up to 30 judges could be accommodated within a given circuit under this "substantive divisions" concept.
>
> 3. Eventually some circuits will have to split when the caseload exceeds the capacity of the maximum number of judges who can be efficiently employed under a "substantive divisions" organization.
>
> 4. Contemporaneously in this evolutionary process there will be the need to furnish assistance to the Supreme Court in its function of guiding and harmonizing the federal law decided by the Courts of Appeals.[15] Such assistance could be furnished alternatively by regional appellate panels of the Courts of Appeals, by appellate panels with jurisdiction over specific subject matter, or by a "national circuit."

This report of the American Bar Foundation is noteworthy because it presents one approach to a long range solution to the problems of the federal appellate system.

The recommendation for restructuring the Courts of Appeals into "substantive divisions" has been analyzed in detail by Professor Carrington.[16] A possibility for changes which will facilitate the work of the Courts of Appeals and also assist the Supreme

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[15] A recent study indicates that the Courts of Appeals do, in fact, make the final decision of national law in an overwhelming majority of cases due to the inability of the Supreme Court to give a high priority to its conflict resolution function. *See* Litigation Flow in the U.S. Courts of Appeals for the D.C., 2nd and 5th Circuits prepared by J. Woodford Howard, Jr., and delivered at a meeting of the American Political Science Association, September, 1971.

[16] Carrington, *Crowded Dockets and the Courts of Appeals: Threat to the Function of Review and the National Law,* 82 HARV. L. REV. 542 (1969).

Court was presented by Judge Shirley M. Hufstedler in her Charles Evans Hughes address.[17]

The American Bar Foundation study and the Carrington and Hufstedler proposals are cited not by way of indicating their acceptance but simply as illustrative of the structural changes in our court system which must be considered in seeking a long range solution to the problem.

The law explosion following the conclusion of World War II was a concomitant of an increased population and an acceleration in the socio-economic affairs of this nation. Neither factor can reasonably be expected to decrease in the near future. While decisions on what is a rational basis for federal jurisdiction are required, such decisions will not eliminate the present problems of our federal appellate courts. The volume of civil rights and habeas corpus litigation of the past decade may well be exceeded by consumer and ecological litigation in the next decade.

A responsive government must meet the needs of its populace for elimination of inequities and excesses. If the redress of such grievances requires judicial intervention, we must be certain that the machinery of our courts will be adequate to the task. Certainty of such adequacy cannot be achieved through resort to short term expediency. It can be achieved only by shaping a long-range plan which will meet the needs of our appellate system not only in 1975 but also in 1990. Hopefully, such a plan will be flexible enough to meet the unforeseeable needs early in the 21st century. It is the duty of all elements of the legal profession—the bench, the bar, and the law schools—to help fashion such a plan. It is the responsibility of the Congress to ultimately approve the most feasible of the alternative choices, or combination of choices, available.

We here offer no prescription for temporary relief of the symptoms described at the outset. Nor do we prescribe radical surgery. Rather, like the old country doctor, having none of the miracle drugs available, we venture the opinion that the patient can be cured by the tender loving care furnished by members of the family. The legal profession must gather around and help to provide a remedy for our ailing federal appellate system.

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[17] Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971).